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IN THE
Supreme Court Of The United States
October Term, 1994

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

FEDERICO PENA, Secretary of Department of Transportation; THOMAS D. LARSEN, Administrator of the Federal Highway Administration; LOUIS N. MACDONALD, Administrator Region VIII of the Federal Highway Administration; and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE**

Atlantic Legal Foundation, Inc. ("ALF") is a not-for-profit public interest law firm incorporated in Pennsylvania whose purpose is to present a balanced articulation of public interest in cases that involve issues of law that are likely to have broad impact beyond the interests of the particular litigants, or that have public policy implications or are significant for the development of principles of constitutional law. ALF has appeared before this Court, several federal courts of appeal and district courts as counsel for parties or intervenors, or as *amicus* and before the highest courts of several states in numerous cases involving issues of public policy or constitutional law, including cases focusing on discrimination and affirmative action policies of the federal government, states and localities.

The issue in this case is of great significance in the development of rational and consistent principles of law in the area of affirmative action.

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* Pursuant to Rule 36 of the Rules of the Court, letters from counsel of record for the parties, evidencing their consent to the filing of this brief are being filed under separate cover simultaneously with the filing of this brief.

SUMMARY OF ARGUMENT

The federal procurement program at issue in this case is both *de jure* and *de facto* racially based. Indeed, the Small Business Administration's application of the statutory standard is not only based on race, it is based on skin color, and constitutes classification and discrimination of the most invidious sort.

The Court of Appeals for the Tenth Circuit applied a test of constitutionality to the federal program at issue which was incorrect. It applied a "lenient standard, resembling intermediate scrutiny," in assessing the federal program's constitutionality, when the applicable precedents require the use of a standard of examination that, if it is not as demanding as "strict scrutiny" is certainly more rigorous than lenient "intermediate scrutiny" as applied by the Tenth Circuit.

The standard of review properly to be applied requires careful judicial evaluation to ensure that the federal program is based on objective standards of discrimination and disadvantage and that it employs a constitutionally permissible means for achieving constitutionally permissible objectives. These standards require that the government body making the classification have before it objectively verifiable data and that the decision maker objectively examine such data.

ARGUMENT

I.

THE COURT OF APPEALS APPLIED AN INCORRECT STANDARD IN DECIDING THE CONSTITUTIONALITY OF THE FEDERAL PROCUREMENT PROGRAM

In this case, Petitioner challenges the constitutionality of the "Subcontracting Compensation Clause" [SCC][1] provision incorporated in bid documents and contract documents used by the Central Federal Lands Highway Division [CFLHD] and the Small Business Act of 1953, as amended, 15 U.S.C. §631, *et seq.*, which is the statutory basis for the racial and ethnic preferences of the SCC program.

The SCC is a racial preference, as that term has been defined by this Court, because its criteria for eligibility include a racial or ethnic determinant. In administering the program, states, their agencies and local governments receiving federal highway funds must determine, in awarding contracts, whether a firm is owned and controlled by persons who are "economically disadvantaged." "Economically disadvantaged" persons are "those socially disadvantaged individuals whose ability to compete...has been impaired...as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. §637(a)(6) "Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias...without regard to their individual qualities." 15 U.S.C. §637(a)(5). "Black Americans, Hispanic Americans,

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[1] The SCC program provides a "bonus" to prime contractors on federal highway construction projects of 10% of the amount of subcontracts the prime contractor awards to "Disadvantaged Business Enterprises" ["DBE"], up to 2% of the dollar amount of the prime contract if more than one DBE is awarded a subcontract, and limited to 1.5% of the prime contract amount if only one DBE is selected to be a subcontractor.

Native Americans, Asian-Pacific Americans and other minorities" are presumed to be disadvantaged. 15 U.S.C. §637(d)(3)(C); *see also* 48 C.F.R. 52.219-8.

This Court has held that a classification "drawn on the basis of race and ethnic status" is a racial classification. *Regents of the University of California v. Bakke*, 438 U.S. 265, 289 (1979).

The Court of Appeals for the Tenth Circuit, in a decision reported at 16 F.3d 1537 (1994), held that notwithstanding the use of a racial classification, the SCC program is not constitutionally infirm because "Congress has expressly mandated a race-conscious program" and a court must apply "a lenient standard, resembling intermediate scrutiny, in assessing the program's constitutionality." 16 F.3d 1537, 1544 (1994). The Tenth Circuit relied heavily on *Fullilove v. Klutznick*, 448 U.S. 448 (1980). We submit that the Tenth Circuit misconstrued *Fullilove* and in so doing applied a level of scrutiny that virtually negates the constitutional role of the judiciary in protecting all persons from discrimination and deprivation of equal protection of the law.

Fullilove focused on the 10% MBE set-aside in the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116 ["PWEA"]. In the six-person *Fullilove* majority which upheld the constitutionality of the act, there were three different opinions, each using a different test in analyzing the statute.

Chief Justice Burger, joined by Justices White and Powell, used a two-part standard: (1) whether the objective was within Congressional authority and (2) whether the limited use of racial and ethnic criteria was a constitutionally permissible means for achieving this objective and did not violate the equal protection component of the Due Process Clause of the Fifth Amendment. Chief Justice Burger wrote that a "program that employs racial or ethnic criteria, even in a remedial context, calls for a close examination," 448 U.S. at 472, emphasis supplied, and that there must be "careful judicial

evaluation to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination." 448 U.S. at 480, emphasis supplied. "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure it does not conflict with constitutional guarantees." (448 U.S. at 491, emphasis supplied)[2] Justice Burger also emphasized that the PWEA MBE program was a "pilot project...limited in extent and duration...." 448 U.S. at 489. He concluded that, notwithstanding deference due to the "politically responsive branches of Government....when such a program comes under judicial review, courts must be satisfied that the legislative objectives and projected administration give reasonable assurance that the program will function within constitutional limitations." 448 U.S. at 490.

Justice Powell, in a separate concurring opinion, referred to his opinion in *University of California Regents v. Bakke*, 438 U.S. 265 (1978) and invoked a strict scrutiny standard, stating that a racial classification is constitutionally prohibited unless it is a necessary means of advancing a compelling government interest, requiring that the government act to remedy the "disabling effects of identified discrimination," 448 U.S. at 496-497, and that the governmental body must make findings that demonstrate the existence of illegal discrimination. 448 U.S. at 498.

Justice Marshall, joined by Justices Brennan and Blackmun, advocated a less onerous test, one he had articulated in his joint separate opinion in *Bakke*; that test requires the courts to ask only whether the means were "substantially related" to an "important and articulated" remedial purpose. 448 U.S. at 518-519.

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[2] *Fullilove* was decided in 1980, before there was any significant experience with SBA's application of the statutory preferences at issue under either PWEA or section 8(b).

Justice Stewart, joined by Justice Rehnquist, and Justice Stevens dissented in separate opinions. Justice Stewart, citing the long-established principle articulated by this Court that "racial discrimination is by definition invidious discrimination", 448 U.S. at 526, warned that "racial discrimination, even 'good faith' racial discrimination, is inevitably a two-edged sword, and [quoting from *Bakke*, 438 U.S. 265, 298] that '[P]referential programs may only reinforce common stereotypes...that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth," 448 U.S. at 531, and that "Notions of 'racial entitlement' will be fostered, and private discrimination will necessarily be encouraged." 448 U.S. at 532.

Justice Stevens would have required that Congress clearly articulate the need and basis for a racial classification and "tailor[] the classification to its justification..." 448 U.S. at 545. He was specifically critical of the way Congress had approached the matter of defining the preferred class:

> The statutory definition of the preferred class includes 'citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts." All aliens and all nonmembers of the racial class are excluded. No economic, social, geographical or historical criteria are relevant for exclusion or inclusion. There is not one word in the remainder of the Act or in the legislative history that explains why any Congressman or Senator favored this particular definition over any other or that identifies the common characteristics that every member of the preferred class was believed to share. Nor does the Act or its history explain why 10% of the total appropriation was the proper amount to set aside for investors in each of the six racial subclasses.

448 U.S. at 535-536. Justice Steven continued: "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.

Quite obviously, the history of discrimination against black citizens...cannot justify a grant of privileges to Eskimos or Indians." 448 U.S. at 537. The difficulties with PWEA identified by Justice Stevens have persisted in federal racial and ethnic preferences in programs adopted subsequent to PWEA.[3]

The issue of which group should receive business preferences

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[3] Drew S. Days, III, then a professor of law, commented on the standard established by *Fullilove*:

> Specifically, I find myself asking whether Congress and the Supreme Court, in enacting and approving the [PWEA], established standards for the formulation and judicial review of minority set-aside programs that, constitutionality aside, fall below those we ought to employ, given our justifiable national sensitivity to racial classifications.
>
> ****
>
> It is difficult to criticize the efforts of people of goodwill seeking to rid our society of its unfortunate legacy of racial discrimination. I would be the first to argue that minority business set-asides, have been proposed, adopted and judicially sanctioned by people acting out of the very best of motives. But more than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system. It must be shown that such a system is responsive to findings of racial discrimination, is designed to redress that problem, and is employed only so long as is necessary to achieve its remedial objective.

Drew S. Days, III, "Fullilove", 96 YALE L. J. 456, 456, 485 (1987).

was raised again in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). In that case, this Court, by a 6 to 3 vote, overturned the City's 30% minority business ["MBE"] set-aside. Justice O'Connor writing for the plurality said that the business set-aside:

> denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their "personal rights" to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decision making.
>
> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.

488 U.S. at 493.

Croson affirmed the principle that the state and local public contracting programs using racial and ethnic classifications are subject to the strict scrutiny test. 488 U.S. at 493. Even if racial and ethnic classifications are found not to be in violation of the Fourteenth Amendment's equal protection clause, only "narrowly tailored" remedies for identified discrimination are permissible. Justice O'Connor, whose opinion was joined in by Chief Justice Rehnquist and Justices White, Kennedy and Stevens, and constituted the opinion of the Court, held that the city had failed to make even a prima facie showing of constitutional or statutory violation by the construction industry in Richmond. 488 U.S. at 500. She noted that the statements of the Richmond City Council that its ordinance was "remedial" and had a benign or legitimate purpose was entitled to little or no weight, and that the conclusory statements of proponents of the plan are of little probative value. Noting that the fact

finding processes of legislative bodies is generally entitled to a presumption of regularity and deferential judicial review, when a legislative body uses a suspect classification, such as race, "it cannot rest upon a generalized assertion as to the classification's relevance to its goals." 488 U.S. at 500.

While the Court in *Croson* recognized that it was applying a different level of scrutiny than did the principal opinion in *Fullilove*, the distinction between Congress and states and localities was that Congress, as the national legislature, "may identify and redress the effects of society-wide discrimination," 488 U.S. at 490, while state and local governments are limited to eradicating "the effects of...discrimination within [their] own legislative jurisdiction." 488 U.S. at 491-492. Under *Croson*, state and local jurisdictions must carefully examine which groups to include in their MBE program to meet the narrowly tailored standard.

We submit that while Congressional findings are entitled to appropriate deference by the courts, such deference is not synonymous with surrender of the constitutional power and duty of judicial review when individuals' constitutional rights are threatened.

In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 110 S.Ct. 2997, *reh'g denied* 497 U.S. 1050 (1990) this Court held that notwithstanding the "great weight" given to decisions of Congress, even congressionally mandated "benign" race conscious measures must satisfy the equal protection requirement. In *Metro Broadcasting*, a severely divided Court, with four Justices writing the plurality opinion, in which Justice Stevens concurred, upheld programs of the FCC that were designed to enhance the diversity of views expressed via the broadcast media, not only for the benefit of minority group would-be station owners, but also for the benefit of the listening and viewing public.

The four dissenters, the Chief Justice and Justices O'Connor, Scalia and Kennedy argued that *Croson* requires that the Court

apply a strict standard of scrutiny to evaluate racial classifications. 110 S.Ct. at 3029. They believed, correctly we submit, that the guarantee of equal protection binds the federal government as well as the States. 110 S.Ct. at 3030. They distinguished between Congress' unique remedial powers under section 5 of Amendment Fourteen, to ensure that the States do not deny equal protection to any person, and the federal government's other powers. More important, they correctly construed *Fullilove* to require that Congressional acts that are based on racial classifications be based on the Government's compelling interest in remedying the effects of identified racial discrimination. 110 S.Ct. at 3033.

In *Metro Broadcasting* both Justice Stevens, concurring in the result, and the dissenters advocated a much more demanding degree of scrutiny than the plurality employed. Thus in *Metro Broadcasting*, a majority of the Court refused to adopt "intermediate scrutiny" as the appropriate test for examining the constitutionality of Congressional acts in the area of equal protection and affirmative action.

Moreover, we submit that *Metro Broadcasting* is distinguishable from the case at bar on at least two grounds: first, the federal government does not have in the field of construction the same singular interest and regulatory authority it has with respect to the natural monopolies that exist in localized radio and television broadcast markets; second, there is no special public interest in ensuring the diversity of contractors who build highways as there is in the breadth of choice available to the consumers of ideas delivered by the mass broadcast media.

To the extent that *Metro Broadcasting* articulated a less rigorous standard of scrutiny than is required by *Fullilove*, it is both distinguishable and wrong.

The Tenth Circuit, purportedly relying on *Fullilove*, held that the racial preferences challenged here are to be scrutinized using a "lenient standard, resembling intermediate scrutiny, in

assessing the program's constitutionality." 16 F.3d 1537, 1544 (1994)[4]. We submit that this is a serious misinterpretation of the weight of the opinions in *Fullilove*, and that *Fullilove*, properly interpreted and applied, requires that the judiciary undertake an examination of the challenged program that is much more critical than the Tenth Circuit's adoption of "intermediate scrutiny". In fact, in *Fullilove* six of the nine justices employed a much more searching level of scrutiny than "intermediate"; four held that PWEA survived that examination, while the two dissenters found that it did not. The Tenth Circuit mistakenly adopted the "intermediate scrutiny" test advocated by Justice Marshall and the two justices who joined him, but rejected by a majority of the Justices who decided the case.

II.

DETERMINATION OF "SOCIAL DISADVANTAGE" IS BASED ON A COLOR LINE

In *Fullilove*, Chief Justice Burger, reviewing the legislative and administrative history of federal affirmative action programs, noted that the PWEA MBE provisions were based on prior Small Business Administration [SBA] practice under section 8(a) of the Small Business Act of 1953, Pub. L. 85-536, 72 Stat. 389. 448 U.S. at 463-464. Indeed, the statutorily specified groups which are "presumptively" disadvantaged under the PWEA and subsequent federal

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[4] The Tenth Circuit stated that because Adarand acknowledged that CFLHD is merely doing what Congress mandated, the agency's action is constitutional unless the underlying legislation is unconstitutional (16 F.3d at 1544). It believed that "the only question to be resolved is whether the SCC program implemented by the CFLHD is narrowly tailored to achieve the remedial purpose of section 502." 16 F.3d at 1546. We submit that the inquiry thus restricted omits an essential issue: Are the racial and ethnic classifications in the statute constitutional?

contracting affirmative action programs closely track the categories administratively established by the executive branch, especially the SBA.

To qualify as eligible for the Subcontracting Compensation Clause program, small businesses must establish that they are "socially and economically disadvantaged" as defined by the Small Business Act. Examination of the history of the Act and its application of the term "socially and economically disadvantaged" reveals that decisions as to which groups were considered disadvantaged and which were not, were made arbitrarily and with neither logic nor fairness.

The Small Business Act originally was race and gender neutral legislation. Throughout the first 15 years after its passage in 1953, the Act aided all small businesses, not only those owned by individuals of particular groups[5]. This is no longer true. The Act now grants the benefit of presumptively disadvantaged status for the Subcontractor Compensation Clause to "Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and other minorities," including those "found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act."[6]

The section 8(a) program's racial and ethnic neutrality ended in 1968, when the Small Business Administration decided administratively to construe its section 8(a) authority to establish set asides for small businesses owned by "socially or economically disadvantaged" individuals. At that time the

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[5] "It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible the interest of small-business concerns in order to preserve free competitive enterprise ..." 15 U.S.C. 631(a).

[6] 15 U.S.C. 637 (d)(3)(C). Determinations of eligibility under the section 8(a) program carry over to other SBA-administered programs, and affect eligibility in the program at issue in this case.

amount of money awarded through section 8(a) began to increase dramatically, growing from $9 million in 1969 to more than $200 million in 1973.

Despite the large sums being awarded to businesses considered socially and economically disadvantaged, this term remained undefined until 1973 when the SBA published in the Federal Register a list of five groups "presumed" to be socially or economically disadvantaged: "[B]lacks, American Indians, Spanish-Americans, Asian-Americans, and Puerto Ricans." There were no hearings or formal findings as to why these particular groups had been included or why others had been excluded.

In 1978, Congress passed P.L. 95-507, the Small Business Investment Act, providing a statutory basis to what had been for a decade a purely administratively-based program, and establishing a three track system for participation. In the first track were small businesses owned by groups (Blacks, Hispanics, and Native Americans) which were considered presumptively "socially and economically disadvantaged." P.L. 95-507 defined socially disadvantaged individuals "as those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." "Economically disadvantaged individuals" were "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired ... as compared to others in the same business area who are not socially disadvantaged." Presumptive eligibility has meant in practice that an owner merely had to prove group membership and that the program's economic standards for "small business" were met. In the second track were businesses owned by members of groups who could petition SBA for presumptive eligibility. In the third track, individual owners were required to qualify on their own according to far more rigorous requirements than those for group eligibility.

This system remains in use today and is the reason why Gonzales Construction Company, the company which was

awarded the subcontract for guardrails, although it was not the lowest bidder, was presumed to be eligible for the Subcontracting Compensation Clause while Petitioner, Adarand Constructors, Inc. was similarly presumed ineligible.

Groups not presumed to be disadvantaged and which petitioned for minority status were evaluated by SBA on several measures. Petitioners had to make an "adequate showing" that the group had suffered racial, ethnic, or cultural bias by demonstrating:

(1) The group has suffered the effects of prejudice, bias, or discriminatory practices;

(2) Such conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in Pub. L. 95-507, and

(3) Such conditions have produced impediments in the business world for members of the group over which they have no control and which are not common to all small business owners.[7]

Congressional intent that SBA not confine benefits solely to the groups listed in P.L. 95-507 was clear. The House Committee report accompanying the new law stated "[t]here is sufficient discretion . . . to allow SBA to designate any other additional minority group or persons it believes should be afforded the presumption of social and economic disadvantage."[8]

In the first of the tracks created by P.L. 95-507 were small businesses owned by those groups considered presumptively

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[7] 13 C.F.R. 124.105(d)(2)

[8] H.R. Rep. No. 949, 95th Cong. 2d Sess. 1978.

"socially and economically disadvantaged."[9] The groups granted presumptive eligibility by P.L. 95-507 were Blacks, Hispanics, and Native Americans. Asian-Americans were apparently inadvertently omitted.

Presumptive eligibility for the groups in the first track provides those groups with extraordinary advantages. The 8(a) program, for example, is administered through authority given to the SBA in the Small Business Investment Act. Billions of dollars are awarded each year through the 8(a) program. The program also serves as a model for many city, county, and state minority business programs around the United States, including federally funded highway projects such as the one in this case. The groups eligible for 8(a) are the same groups eligible for other federal, as well as state and local programs.

In the middle track created by P.L. 95-507 were businesses owned by members of groups that could petition for presumptive eligibility as socially and economically disadvantaged. In the third track, those seeking individual determination of social and economic disadvantage are persons who have to qualify on an individual basis. These individuals need to establish that he or she had suffered chronic disadvantage that had a tangible negative impact on entry or advancement in the business world. Individuals within the presumptively disadvantaged groups are not subjected to similar standards. Every person in the groups with presumptive eligibility, even those born into wealthy families or those newly arrived in the country, and without any experiences of discrimination, are permitted to participate in the 8(a) program.

The inclusion of groups as eligible, either by Congress or by the SBA has been arbitrary, and is based on no objective economic or sociological criteria. It includes some, but not all,

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[9] In practice, presumptive eligibility has meant that a business owner has only to prove group membership and that economic limitations of firm size and income had not been exceeded.

groups that have historically suffered discrimination, and it also includes groups which have only recently arrived in the United States and have no history of being discriminated against.

Since 1979, eight groups have petitioned the agency for presumptive eligibility. Of the eight petitioning groups Asian Indians, Tongans, Sri Lankans, and Indonesians were accepted; Hasidic Jews, women, disabled veterans, and Iranians were rejected. In 1988, Congress found that women as a group are presumptively eligible for most federal programs. However, women remain ineligible as a group for the 8(a) and SCC programs. *See generally*, George R. LaNoue and John C. Sullivan, Esq., "Presumptions for Preferences: The Small Business Administration's Decisions on Groups Entitled to Affirmative Action", 6 JOURNAL OF POLICY HISTORY 429 (1994) [hereafter "LaNoue and Sullivan"], which describes in detail the history of SBA's consideration of and decisions regarding theses applications, based on a close examination of the SBA's files.[10]

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[10] *See* LaNoue and Sullivan. Below is a summary of SBA responses to petitions for presumptive group eligibility in the 8(a) program, taken from LaNoue and Sullivan.

Group	Date of Original Petition	Date of Official Decision	Outcome	Decision Rationale
Hasidic Jews	12/27/79	4/19/80	Rejected	First Amendment concerns
Asian Indians	6/30/81	2/26/82	Accepted	Comparable to Asian-Pacific group
Women	12/24/81	5/11/82	Rejected	Not a traditional minority

In making determinations on the eight petitions, the SBA did not apply consistent standards for measuring social and economic disadvantage. Instead, the agency seems to have drawn a "people of color" line in deciding eligibility for the 8(a) program. The SBA accepted all petitions from non-white applicants, but rejected Iranians, Hasidic Jews, women, and disabled veterans, none of which is a non-white group.

For only the first of these petitioning groups, Hasidic Jews, was there any substantial debate over the decision to include or exclude a group.[11] Subsequent petitions were dealt with

Tongans	11/3/86	--	Accepted	Aug. 31, 1989 expansion of Asian Pacifics class
Service Disabled Veterans	8/10/87	12/16/87	Rejected	Vets are handicapped not minorities
Sri Lankans	10/20/87	2/24/88	Accepted	Subcontinent Asian Americans
Iranians	8/17/87	1/6/89	Rejected	Not long term bias victims
Indonesians	7/24/88	3/24/89	Accepted	Pacifics

[11] As Professor George R. LaNoue and John C. Sullivan, Esq. describe at 448-449, in a memorandum to Stuart Eizenstat, Assistant to the President for Domestic Affairs and Policy, staff reported on the controversy which was described as a "no-win situation." Edward Norton, SBA General Counsel, had determined that the language of PL 95-507 made it "clear that the 8(a) program is not exclusively a racially preferential program." Furthermore, Norton concluded after a thorough

review of the legislative history, "there does not appear to be a defensible legal justification for rejecting the Hasidic application" and that if such a rejection occurred litigation would result. Norton warned:

> In the event of litigation, the eligibility requirements for the 8(a) program will be strictly scrutinized by courts which might have sharply differing attitudes from SBA as to which groups should be considered socially disadvantaged. From SBA's standpoint, it is far preferable that it make those judgments.
>
> Litigation might also endanger affirmative action efforts in general. Thus far, the courts have given administrative agencies some leeway to make findings of discrimination and to take appropriate steps to remedy that discrimination. If SBA abstains from making such findings in a case where they appear to be clearly warranted, if not actually compelled by statute, a court might narrow substantially the authority administrative bodies now have to impose exclusively racial preferences as remedies for discrimination.

Norton then proposed that the Hasidic Jews be accepted, but on such narrow grounds that other groups could not take advantage of the precedent. This would be done by defining them as an ethnic group with a strange appearance, language problems, and unusual customs. This finding, he concluded:

> could be massively documented, both with anecdotal and statistical data. This would help to distinguish the Hasidim from other groups which may not be analytically distinguishable but which could not amass the same degree of evidence as can be done in this case.

In 1974, the SBA had itself recognized that Hasidic Jews had been hampered because of social or economic disadvantage and so were entitled to participate in the agency's Minority Enterprise Small Business Investment Company (MESBIC) program. Hasidic Jews are treated inconsistently by the SBA: the group is considered sufficiently disadvantaged for the agency's MESBIC program but not disadvantaged enough for the agency's 8(a) program or the SCC.

The petition of the Hasidic Jews stirred substantial controversy, and was aired in the press in New York and Washington.

internally at SBA.[12]

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[12] After the Hasidic Jewish petition was denied, the National Association of Americans of Asian Indian Descent (NAAAID) filed. The Asian Indian petition was rejected by SBA on September 24, 1981 in a response less than one-tenth the length of its reply to the Hasidic Jews. The SBA declared that NAAAID failed to make a prima facie showing on six of the seven standards.

The following year NAAAID tried again, submitting another petition. The petition addressed the issue of identifiability, an underlying theme to several of the deficiencies cited in the SBA's response to NAAAID's first petition. The 1982 petition identified color as the primary characteristic setting off Asian Indians as a discrete minority.

On February 26, 1982, the SBA "...[D]etermined that the petition is adequately documented and makes a prima facie showing as to each of the standards set forth in the Rules and Regulations."

In May, 1982 a notice in the Federal Register invited comments on the proposed inclusion of the Asian Indians. After receiving comments, in August 1982, the agency published another notice in the Federal Register which formally granted 8(a) inclusion to the Asian Indians and also granted presumptive minority eligibility to those from Pakistan and Bangladesh, even though no one from those countries had petitioned SBA.

On December 24, 1981 a petition on behalf of the National Association of Women Federal Contractors was submitted to SBA . Like other applicants, the women contractors stressed that P.L. 95-507 was "not limited to" (emphasis in original) the minority groups named in the legislation, but they also had a strong case for their particular petition. They quoted the House Small Business Committee's Subcommittee on Minority Enterprise and General Oversight on P.L. 95-507 which said:

> women, as a class of individuals, have been and continue to be excluded from equitable participation in our economy as business owners. This lack of access to our business system is the direct and indirect result of sex discrimination.

In 1979, Asian-Americans, who had not been included in the statutory language of P.L. 95-507 as one of the presumptively eligible groups, lobbied to be reinstated. No formal SBA process was involved. In July, 1979, the SBA divided Asian-Americans into two categories. The first was "Asian Pacific Americans," consisting of American citizens from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territory of the Pacific, the Northern Marianas, Laos, Cambodia, and Taiwan. A decade later, The Asian Pacific category added Burma, Thailand, Malaysia, Singapore, Brunei, Republic of the Marshall Islands, and the Federated States of Micronesia. The second category of Asian Americans established in 1979 was "Subcontinent Asian-Americans," consisting of persons from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, and Nepal.[13]

Examining this record, it is difficult to discern any consistent application of the SBA's published procedural or substantive

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and then concluded that "the government should utilize its vast purchasing power to assist female-owned businesses as well as small and minority businesses." Notwithstanding the fact that women-owned business enterprises (WBEs) were included in many set-asides and goal programs, such as those of the Department of Energy, the Department of Transportation, and the Federal Deposit Insurance Corporation, as well as programs operated by many state and local governments, on May 11, 1982, SBA issued a single page denial of the women's petition "based upon our findings that presumptive group 'social disadvantage' is primarily intended for the traditional 'minority' groups and should not be extended to the broader class of 'women.'"

Subsequent to these filings in the early 1980's, several other groups -- Tongans, disabled veterans, Sri Lankans, Iranians, and Indonesians -- applied for presumptively disadvantaged status. The applications of the disabled veterans and the Iranians were denied, the others granted. *See* LaNoue and Sullivan, *passim*.

[13] 54 Fed. Reg. 12057 (1989). For unstated reasons, the SCC does not list Subcontinent Asian-Americans among the presumptively eligible groups.

standards.[14]

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[14] Chronology of Groups Presumptively Eligible for MBE Preferences

Source	Date	Changes in Groups	Comment
Executive Order 11625	10/13/71	Negroes, Puerto Ricans, Spanish-speaking Americans, American Indians, Eskimos, Aleuts	Possibly the earliest listing of groups. Superseded E.O. 11458, which did not list any groups.
38 Fed.Reg. 13729	5/25/73	*Black Americans*, American Indians, *Spanish-Americans*, oriental Americans, (Puerto Ricans)	SBA's first listing. Earlier regulations simply stated "socially or economically disadvantaged" persons.
Public Works Employment Act, P.L. 95-98	5/13/77	*Negroes, Spanish-speaking, Orientals, Indians*	Rep. Parren Mitchell's Amendment which set aside 10% of $4 billion PWEA for the listed groups.
Small Business Investment Act, P.L. 95-507	10/24/78	*Black Americans, Hispanic Americans, Native Americans* includes Indians, Eskimos, Aleuts	Congress passed this law to reform the 8(a) program; Asian-Americans were omitted.
44 Fed.Reg. 30673	5/29/79	Hawaiians	Added Hawaiians to Native Americans.

SBA ruling	7/6/79	Asian Pacific Americans; from Japan, China, Philippines, Vietnam, Korea, Samoa, Guam, U.S. Territory of the Pacific Islands, Northern Mariana Islands, Laos, Cambodia, Taiwan	The SBA interim rule which, for the first time, defined an entire group -- Asian Pacific Americans.
SBA, 45 Fed.Reg. 42832	4/9/80	(Hasidic Jews)	Decision to reject Hasidic Jews based on First Amendment.
Small Business Admin. Act of 1980, P.L. 96-302	7/2/80	Asian Pacific Americans	Legislative approval to the groups administratively added by the SBA.
SBA ruling	5/11/82	(Women)	SBA unwilling to extend traditional ethnic and racial coverage group to broader class of women.
SBA ruling	7/26/82	Asian Indians	Accepted petition, later all Indian Subcontinent persons added

SBA ruling	11/3/86	(Tongans) Tongans 1989	In first ruling, Tongans had not made a case. They were added in 1989 expansion of Asian Pacific group.
SBA ruling	12/16/87	(Disabled Veterans)	Prejudice against disabled veterans was caused by their handicaps, not veterans' status.
SBA ruling	7/25/88	Indonesians	SBA never ruled on petition; Indonesians added in March, 1989 as part of expansion of Asian Pacific group.
SBA ruling	3/15/88	Sri Lankans	Sri Lankans considered Subcontinent Asian Americans.
SBA ruling	1/6/89	(Iranians)	Prejudice against Iranian-Americans not sufficiently long-standing.

SBA, 54 Fed.Reg. 12057	3/23/89	Asian Pacific Americans: from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China, Taiwan, *Kampuchea*, Vietnam, Korea, the Philippines, *Trust Territory of the Pacific Islands (Republic of Palau.)* Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam and Samoa; Subcontinent Asian-Americans; India, Pakistan, Bangladesh, Sri Lanka, Bhutan and Nepal. (Laos)	Rule added eight countries to Asian Pacific group and added an entire new category, "Subcontinent Asian Americans." Most of these changes reflected existing SBA rules.
SBA, 54 Fed. Reg. 34717	8/21/89	Asian Pacific Americans: *Cambodia (Kampuchea)*, Macao, Hong Kong, Fiji, Tonga, Kiribati, Tuvalu, Nauru); Subcontinent Asian Americans, the Maldives	Reinstated Laos, which had been inadvertently deleted; and added eight other countries.

Source: Derived from LaNoue and Sullivan, *passim*.

While determining the relative social disadvantages of groups may be necessarily subjective, the relative economic disadvantage of groups is quantifiable and the data were often available from Census records. SBA never used the available Census data, nor did it analyze that data when petitioners introduced it, but instead employed a variety of rationales that appear largely to be pretexts for its decisions. The putative requirement that there be evidence of "long term" prejudice and discrimination in American society, used to exclude Iranians and disabled veterans, was not applied to other new immigrant groups such as Asian Indians or the Asian Pacific Islanders.

Similarly, the application of the standard that groups not be too narrow and represent only an individual nation, which was used as a basis for rejecting against the Iranians' petition, is inconsistent with the fact that when SBA expanded eligibility throughout much of Asia, the agency did so on a country-by-country basis, adding Burma, Japan, etc. It informed the Tongans in 1987 that they were too small a group to "warrant an SBA determination of minority group status" but admitted them in 1989 along with people from the Marshall Islands and Micronesia.[15]

The SBA turned down women because it did not wish to extend beyond "8(a) traditional minority groups," although women were participants in other federal programs and evidence of cultural discrimination against women in business was substantial. In 1988, Congress effectively overturned that decision by adding women to the rest of SBA's "portfolio," but women are still not eligible for section 8(a) set-asides. The agency rejected disabled veterans, although disability and veteran status are common in other affirmative action programs. Although Hasidic Jews were already eligible for other Department of Commerce and SBA programs and the existence of discrimination against them was clear, they were excluded from 8(a) participation ostensibly on constitutional

[15] Letter from Wilfredo Gonzales, April 23, 1987 at 2, cited by LaNoue & Sullivan at 454 n. 55.

(separation of church and state) grounds, without citing any statute or court case.

On the other hand, when the agency did expand eligibility, as it did in 1979 when persons from twelve Asian countries were brought in, or, in 1982, when persons from the Indian sub-continent were included, it did so without any independent examination of the actual social or economic status of those groups in America. Had SBA done so, it would have discovered that Asian Americans, specifically Asian Indians, Chinese and Japanese, are the best educated and most prosperous of all the nation's larger racial groups and have made great strides in developing businesses.[16] [17]

[16] United States Civil Service Commission, "Civil Rights Issues Facing Asian Americans in the 1990's" at 11-12 (February 26, 1992).

[17] Education and Income by Affirmative Action Groups (1980)

Group	Percentage High School Graduates	Family Median Income
Asian-American	76.4	$24,133
White	69.9	$21,014
American Indian	55.8	$13,678
Hispanic	45.4	$14,712
Black	51.2	$12,627
Eskimos/Aleuts	44.3	$15,660

[Source: U.S. Bureau of the Census, 1980 Census of the Population, General Social and Economic Characteristics United States Summary, (Washington, D.C.: G.P.O., 1983) Tables 166, 170, 171]

A skin-color hypothesis explains why the SBA has accepted petitions from persons from every non-white Asian country, but has rejected Iranians, and, for that matter, why it did not add Afghanis, when it added Nepal and Bhutan in 1989. It would also explain why the petition of the Hasidic Jews, women, and disabled veterans were rejected.

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[17] (cont'd)

Business Participation Rates of Selected Ethnic Groups

Ancestry Group	Business Formation per 1000 population	Mean Income from All Sources of Self Employed Persons
Korean	69.2	$18,500
Japanese	64.8	19,680
Chinese	60.2	18,980
U.S. Average	48.9	18,630
Cubans	47.9	17,310
Filipinos	22.4	27,800
Asian Indians	47.1	29,800
American Indians	33.3	13,110
Subsaharan Africans	13.6	11,260
Puerto Ricans	10.6	11,490

Source: Frank A. Frato and Ronald L. Meeks, Office of Advocacy, Research and Information, Minority Business Development Agency, U.S. Department of Commerce, "Business Participation Rates of the 50 Largest U.S. Ancestry Groups: Preliminary Report" (1985), in George R. LaNoue and John C. Sullivan, " 'But for' Discrimination: How Many Minority-Owned Businesses Would There Be?", 24 Colum. Human Rights L. Rev. 293, 132 (Winter 1992-1993).

SBA's decision to draw a "people of color" line around its formal Congressional mandate, as evidenced by its formal Policy and Procedural Release No. 2017.

In drawing the color line, as SBA appears to have done, it ignores the reality that in the world of small businesses, race and ethnicity are not very good surrogates for size or success. In 1982, 64% of all businesses owned by white males had net receipts of less than $25,000, compared to 69% of firms owned by Hispanics, 70% of firms owned by Blacks, and 65% of firms owned by other minorities (mostly Asians). Similarly 81% of all businesses owned by white males had no paid employees compared to 84% of firms owned by Hispanics, 87% of firms owned by Blacks, and 81% of firms owned by other minorities.

SBA's reliance on a color line has led it to make decisions inconsistent with both the historical record and the contemporary evidence of discrimination in America. It has included groups (Tongans and Sri Lankans) for whom there was no history of discrimination because they were barely present in the country until recently, while excluding groups which have faced discrimination since the founding of the Republic (Jews and women). By refusing to apply an empirical test of contemporary socio-economic status, the agency was left with no principled basis on which to include Asian Indians and exclude Iranians, both recent immigrant groups.

The SBA's determinations are arbitrary and do not effect the purposes of the Small Business Act, nor do they further a legitimate and important, much less a compelling government interest.

CONCLUSION

The use of a color line by the SBA in determining presumptive disadvantage has created a racially biased Subcontracting Compensation Clause program. That program does not withstand the careful judicial evaluation required by the constitutionally mandated degree of scrutiny.

For the reasons discussed above, the judgment of the Court of Appeals for the Tenth Circuit should be reversed.

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